State of Michigan

In the Supreme Court

Appeal from the Court of Appeals
Neff, P.J. and O'Connell and R. J. Danhof, JJ

Tony J. **Daniel**,

Plaintiff-**Appellee**,

v.

State of Michigan
(Department of Corrections),

Defendant-**Appellant**.
_____/

Docket No. 120460

COA Docket No. 224423

WCAC Docket No. 99-0063

Brief in Reply – Appellant

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October 30, 2002 (DANIEL.SCTREPLY))

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ARGUMENT

The Workers' Compensation Appellate Commission did recognize and acknowledge pre-existing case law.

In response to Mr. Daniel's argument that the Appellate Commission failed to recognize or acknowledge pre-existing case law, the State invites the Court's attention to the following supplementary materials that were handed down or discovered after the State filed its Appellant's brief on August 26, 2002. All of these supplementary materials support the Order of the Workers' Compensation Appellate Commission denying benefits to Mr. Daniel, the Order being based on the Commission's Opinion that Mr. Daniel was injured by reason of his intentional and wilful misconduct.

This Court's 1922 decision in *Gecesa v Consumers Power Co*[1] supports the position that in interpreting the Michigan workers' disability compensation law, it is appropriate to look to those British cases, handed down before the enactment of the Michigan law in 1912, that interpreted the British Act from which the Michigan law was taken.

> "The question [meaning of 'out of and in the course of employment'] has been before the courts of England under a statute containing like language to ours, and from which statute the language of our statute is taken. . . . The importance of them, or at least the importance of those which antedate our statute, will be apparent when we consider the fact that they construe the language of the English act, which language we have adopted and written into our statute. . . ."[2]
>
> "We are persuaded that we should follow the doctrine of the English cases: (1) They adopt a construction of language used in a statute, which language after such construction was written into

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[1] 220 Mich 338; 190 NW 279 (1922).
[2] 220 Mich at 344-345; 190 NW at 281.

our statute. (2) Because we conceive it to adopt a correct rule. . . .
„[3]

The 1914 discussion at 78 Central Law Journal 436 on "The Defense of 'serious and wilful misconduct,' under the Workmen's Compensation Laws," relying primarily on British cases, lends further support to the argument presented by the State in its Appellant's brief, in support of the Commission's Order, that "intentional," substituted

thoughtless act on the spur of the moment.[7] It is not enough that the act is wilful, it must be done by the workman with the intention or knowledge of being guilty of misconduct. 'Wilful' must be considered with the word 'misconduct.' Nearly all conduct is wilful, that is, intentional, and the same act may constitute intentional or wrongful conduct and amount to misconduct without being wilful misconduct. To make misconduct wilful the person guilty of it must know that his conduct is wrongful, or pursue his course in disregard of whether it is right or wrong. Of course, wilful misconduct may be of omission as well as commission. . . . "[8]

"Wilful misconduct is very different from negligence, and is very

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[7] *Accord*: *In re Nickerson,* 218 Mass 158, 160; 105 NE 604 (1914), *Diestelhorst v Industrial Accident Commission*, 32 Cal App 771, 778; 164 P 44, 47 (1917), *Wick v Gunn*, 66 Okla 316, 318; 169 P 1087, 1089 (1917), *Baltimore Car Foundry Co v Ruzicka*, 132 Md 491, 494; 104 A 167, 168 (1918), *Gonier v The Chase Companies*, 97 Conn 46, 56; 115 A 677, 680 (1921):

> "No misconduct which is thoughtless, heedless, inadvertent or of the moment, and none which arises from an error of judgment, can be 'wilful and serious misconduct.' *Johnson v. Marshall, Sons & Co.*, 94 Law T. Rep. 828; . . . "

Morley v United Friendly Insurance PLC, Neill, LJ. [1993] All ER 47, [1993] WLR 996, [1993] 1 Lloyd's Rep 490.

> "On the meaning of the word 'wilful' in this clause I have derived assistance from the speech of Lord Loreburn LC in *Johnson v Marshall, Sons & Co Ltd* [1906] AC 409, 411, where he said that the words 'wilful misconduct' in the Workmen's Compensation Act [of] 1897 imported that 'the misconduct was deliberate' and not 'merely a thoughtless act on the spur of the moment.' . . . "

In relation to the "serious and wilful misconduct" defense, the 1906 Act, 6 Edw 7, c 58, had the same wording as the 1897 Act, 60 and 61 Victoria, c. 37, with the difference being the 1906 Act had additional language to the effect the serious and willful misconduct defense did not apply if the injury resulted "in death or serious and permanent disablement."

[8] 78 Central Law Journal 437.

much more grave, regardless of the degree of negligence. . . . "[9]

The article entitled "Workmen's Compensation in Michigan," at 10 Michigan Law Review 278 (1912), provides some background on the 1911 report recommending a Michigan workers' disability compensation act, an act intended to provide complete protection "for all accidents except the result of willful fault," for government entities and those employers electing to come within the Act.[10]

> "[I]t can, we think, be safely predicted that the activity of the legislatures of the several States and of Congress, urged on by the tremendous public sentiment that appears to be behind the

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[9] 78 Central Law Journal 437. *Accord*: *Beckles Case*, 230 Mass 272, 274; 119 NE 653, 653-654 (1918).

> "The finding that the subscriber was grossly negligent falls short of a finding that he was guilty of serious and willful misconduct. . . . *Johnson v. Marshall Sons & Co.* [1906] A. C. 409, 411."

Bist v London & Southwestern Rail, Co, [1907] A.C. 209 at 211, Lord Loreburn, L.C.

> "Negligence will not suffice."

[10] Except for government entities, the 1912 Michigan law was elective. As of the time of the Michigan enactment, New York's highest court in *Ives v South Buffalo Railway Co*, 210 NY 271; 94 NE 431 (1911) (Mar 24), had found unconstitutional the 1909 New York law, that was compulsory for certain hazardous industries, because "it authorizes the taking of the employer's property without his consent and without his fault," and it was not a proper exercise of the police power; Washington's 1911 law, compulsory for certain extra-hazardous industries, had been found constitutional, *State of Washington v Calusen,* 65 Wash 156; 117 P 1101 (1911) (Sept 27); and Wisconsin's broad 1911 elective law had been found constitutional, *Borgnis v The Falk Co*, 147 Wis 327; 133 NW 209 (1911 (Nov 14). After an amendment to the New York Constitution, New York's 1913 compulsory workers' compensation law for 42 groups of hazardous employments was found constitutional in *New York Central Railroad Co v White*, 243 US 188; 37 SCt 247; 61 LEd2d 667 (1917).

> movement for workmen's compensation,[11] will ultimately result in some plan which will not run counter to constitutional provisions, and can receive the final approval from the courts of the land. That such plan, at least for the present, must be based upon the elective system seems for the present both advisable and necessary. . . . [A]ny provision for a sure payment of a limited compensation, is a distinct advance upon the present system of employers' liability . . . ."[12]
>
> "The Michigan Workmen's Compensation Commission . . . prepared a compensation act, compulsory as to the State and its subdivisions, but elective or optional as to all other employers of workmen . . . . The cardinal principles of the act proposed can be briefly stated: First, reasonable compensation; at minimum cost for all accidents except the result of willful fault. . . ."[13]

And, in *Watts v Department of Corrections*,[14] a recent unpublished Court of Appeals intentional and wilful misconduct case, where the Commission, relying on its opinion in *Daniel*, had found intentional and willful misconduct, the Court of Appeals panel in *Watts* stated:

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[11] *E.g.*, *Borgnis v The Falk Co*, 147 Wis, 327, 347; 133 NW 209, 215 (1911) (Nov 14).

> "It is a matter of common knowledge that this [elective workers' compensation] law forms the legislative response to an emphatic, if not a peremptory, public demand . . . , a great economic and social problem which modern industrialism has forced upon us . . . ."

According to "The Workers' Compensation Principle: A Historical Abstract of the Nature of Workers' Compensation," 9 Hamline Journal of Public Law and Policy 285, 292 (1989), the impetus for this movement towards workers' disability compensation was the publication in 1893 of "Compulsory Insurance in Germany," by John Graham Brooks, the Fourth Special Report of the United States Commissioner of Labor [Library of Michigan fdoc C 8.5: 4th 1893], with an Appendix relating to compulsory insurance in other countries in Europe.

Section 7 of the July 13, 1887 German act for insurance against accidents of persons engaged in maritime callings annulled a claim for compensation in case the injured man willfully brought the injury upon himself (Fourth Special Report, p 118).

[12] 10 Mich L Rev at 289.

[13] 10 Mich L Rev at 289-290.

[14] Unpublished (copy attached), Court of Appeals No. 230264 (October 4, 2002).

> "Although we do not agree whether the logic used by the *Daniel* [Court of Appeals] panel was correct, we are nevertheless bound by that decision. MCR 7.215(I)(1)."[15]

In remanding the matter to the Workers' Compensation Appellate Commission, the *Watts* panel suggested that the Commission "hold the matter in abeyance pending our Supreme Court's disposition of the *Daniel* case."[16]

It would seem, then, that but for Mr. Daniel's own deliberate wrongful conduct, his sexual harassment of women county public defenders, he would not have been "injured" (a temporary mental disability from the ensuing disciplinary action), and the prevailing issue before this Court is what the Legislature meant when on March 8, 1912, it accepted the House Committee on Labor's recommended substitution of "intentional" for "serious" in "serious and willful misconduct" of HB 1 (1912) [1st ex sess].[17]

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[15] Slip op, p 2.
[16] Slip op, p 2.
[17] App 58a-59a.

RELIEF

The decision of the majority of the Court of Appeals panel, that reversed the Workers' Compensation Appellate Commission's denial of benefits to Tony J. Daniel, should be reversed.

Respectfully submitted,

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October 30, 2002

STATE OF MICHIGAN

COURT OF APPEALS

PHYLLIS E. WATTS,

Plaintiff-Appellant,

v

DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

UNPUBLISHED
October 4, 2002

No. 230264
WCAC
LC No. 00-000028

Before: Holbrook, Jr., P.J., and Zahra and Owens, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from an order of the Workers Compensation Appellate Commission (WCAC) affirming the magistrate's denial of disability benefits. We reverse and remand.

Plaintiff sought to recover workers' compensation benefits alleging in pertinent part "emotionally stressful work circumstances, giving rise to reactive depression and disability." The magistrate found that plaintiff was mentally disabled, and that the disability prevented her from returning to work in her previous position. The magistrate also found that defendant's disciplining of plaintiff "played a significant role in the development of Ms. Watts' emotional condition." However, the magistrate concluded that plaintiff's entitlement to benefits ended on December 29, 1996, when plaintiff's final violation of defendant's policies resulted in her "just cause" termination.

Plaintiff appealed this ruling to the WCAC. The WCAC noted that MCL 418.305 precludes an employee from recovering workers' compensation benefits where the employee is injured by his or her intentional and willful misconduct. The WCAC found that it was plaintiff's intentional and willful misconduct that led to the discipline, which purportedly caused her mental illness. Thus, the WCAC ruled that MCL 418.305 barred plaintiff from recovering workers' compensation benefits. Therefore, the WCAC affirmed the magistrate's denial of benefits, albeit on different grounds.

On appeal, plaintiff challenges the WCAC's decision, as well as the magistrate's denial of benefits. "[I]n the absence of fraud, we must accept the WCAC's findings of fact as conclusive if there is any competent evidence in the record to support them." *Woodman v Meijer*, 250 Mich App 598, 603-604; __ NW2d __ (2002). However, we review de novo questions of law, and may reverse the WCAC's decision if it is based on a legal error. *Id.* at 604.

In *Calovecchi v Michigan*, 461 Mich 616, 622; 611 NW2d 300 (2001), our Supreme Court recognized that a person may recover under the Workers' Compensation Disability Act for personal injuries "arising out of and in the course of employment." The Court noted that MCL 418.401(2)(b) provides in pertinent part:

> Mental disabilities and conditions of the aging process, including but not limited to heart and cardiovascular conditions, shall be compensable if contributed to or aggravated or accelerated by the employment in a significant manner. Mental disabilities shall be compensable when arising out of actual events of employment, not unfounded perceptions thereof. [See *Calovecchi, supra* at 622 n 3.]

Our Supreme Court also noted the following commentary: "[A]n injury is 'compensable' if it 'results from the work itself, or from the stresses, the tensions, the associations, of the working environments, human as well as material . . . .'" *Id.* at 625, quoting *Crilly v Ballou*, 353 Mich 303, 326; 91 NW2d 493 (1958). The *Calovecchi* Court further noted that "acts of employer-imposed discipline are a predictable part of the working environment." *Calovecchi, supra* at 625. Accordingly, the Court opined that a mental illness arising out of disciplinary proceedings may be compensable. *Id.* at 623-625.

The *Calovecchi* Court was not asked, however, to consider whether MCL 418.305 would bar a claim for mental illness arising out of disciplinary proceedings. But a panel of this Court recently considered the issue. *Daniel v Dep't of Corrections*, 248 Mich App 95, 101-103; 638 NW2d 175 (2001), lv gtd 466 Mich 889 (2002). The panel opined that the "voluntary" acts resulting in discipline and the subsequent mental illness were too "attenuated" to bar recovery under MCL 418.305. *Id.* at 102. Thus, the *Daniel* panel reversed the WCAC decision denying benefits. *Id.* at 106.

We note that, in the instant matter, the WCAC relied heavily on its now-reversed opinion in *Daniel*. Although we do not agree whether the logic used by the *Daniel* panel was correct, we are nevertheless bound by that decision. MCR 7.215(I)(1). Ultimately, our Supreme Court will resolve that issue for us. In the interim, we believe that it is appropriate to reverse and remand for reconsideration in light of our decision in *Daniel*. Also, to promote judicial efficiency, we recommend that the WCAC hold the matter in abeyance pending our Supreme Court's disposition of the *Daniel* case.

Reversed and remanded. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Donald E. Holbrook, Jr.
/s/ Brian K. Zahra
/s/ Donald S. Owens